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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re Tommy M., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. TOMMY M., Defendant and Appellant.	A147813 (San Francisco County Super. Ct. No. JW 15-6136)

Tommy M., when one month shy of his 18th birthday, participated in the robbery of a young woman's cell phone and then ran from the police when they tried to apprehend him. He was adjudged a ward of the court as a result, with true findings that he had committed a felony second degree robbery (Pen. Code, §§ 211, 212.5) and resisted arrest, a misdemeanor (Pen. Code, § 148). He claims on appeal that a police investigator violated his *Miranda* rights when he asked Tommy for his phone number as biographical identifying data, without administering a *Miranda* warning. (*Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).) He further claims the court erred in denying his *Marsden* motion (*People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*)) and denying his attorney's simultaneous motion to withdraw as counsel due to a "conflict of interest." He contends there was insufficient evidence to identify him as one of the robbers. With respect to disposition, Tommy argues an electronics search condition violated *People v. Lent* (1975)

15 Cal.3d 481 (*Lent*) and was unconstitutionally overbroad insofar as it applied to devices other than his cell phone. Finally, Tommy suggests the trial court erred in stating a maximum term of confinement.

With the exception of the last point, we find no error and affirm, with directions to strike from the reporter's transcript the court's stated maximum term of confinement.

I. BACKGROUND

On June 23, 2015, at about 4:30 p.m., two African-American young men forcibly took a cell phone away from Dan Xie, a 20-year-old Chinese woman, while she sat at a bus stop at the corner of 18th and Mississippi Streets in San Francisco. The first robber to grab for her phone was taller than the other. He had dark skin, short black hair, and he was wearing a dark or black long-sleeved jacket. A second, shorter man, wearing a T-shirt with a white torso with printed letters and black, mid-length sleeves,[1] reached in and grabbed the phone with both hands as the first man struggled with Xie over the phone. The two men got the phone away from Xie. Both men then took off running around the corner, heading north on Texas Street.

Following them, Xie saw a third African-American man standing about two blocks away, whom she thought was the "lookout." The two robbers ran to where the third man was standing near a black car with yellow-paper dealership license plates that was parked on the street. By the time Xie caught up with them, the shorter second robber was seated in the driver's seat. The first, taller robber was standing by the passenger door with Xie's phone in his hand. Xie tried to grab her phone away from him, but the man raised his other hand in a threatening manner toward Xie. He and the third suspect[2] then ran off, going north on Texas Street. The black car pulled away quickly, also heading north on

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[1] Xie told Officer Jose Calvo-Perez that the second robber was "a black male[,] in his 20s[,] wearing a multicolored shirt and jeans." Erica Hollins described D.T. as wearing: "hightop, blue shirt, blue jeans, young."

[2] The third suspect was identified by the prosecutor as Donte Glenn, an adult.

Texas Street. Two elderly women asked Xie what had happened and helped her call the police.[3]

A motorist passing by, Eric Koczab, saw what was transpiring and drove after the black car. After a couple of turns, when the black car turned into oncoming traffic, he abandoned his pursuit and returned to the scene of the robbery, where the victim was still in distress. He described the robbers as two African-American men, one wearing a hoodie with a gray upper-half and black bottom-half and dark pants. He could not describe what the other one was wearing and did not perceive any height difference between them. During the chase, Koczab thought he saw one of the robbers, the "gray hooded individual," running through traffic toward the black car.

Kim Lavalle was standing near her car on the other side of Texas Street when she heard the commotion and saw several people running north on Texas Street. As the black car drove away, Lavalle rushed to Xie to see what had happened. Xie had dropped to her knees and was crying. After speaking with Xie for two seconds, Lavalle got into her car and followed the black car. She soon decided she could not catch up to it, so she started following one of the people who had left the scene on foot. She described him as a tall, slender African-American man with short to medium-length hair. She followed him until she saw him go into the Center Hardware store on Mariposa. She then returned to Texas Street where Xie was still waiting and crying. Lavalle announced to those assembled that she had seen one of the men go into the hardware store on Mariposa.

Koczab drove Xie to Center Hardware. She waited in the car while Koczab went into the store to see if the two robbers were there. He immediately spotted the man with the gray-and-black hoodie at the front counter, using the store's telephone. Koczab told the store manager what had happened, and the manager approached the man using the phone. The suspected robber then ran out of the store and across Mariposa, with Koczab in pursuit.

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[3] Xie's native language is Cantonese. She speaks some English, but the police contacted Language Line for help with translation while interacting with Xie in the field. Xie testified through an interpreter at the contested jurisdictional hearing.

The suspect near the hardware store was described by dispatch as a "black male, late teens, early 20s, with an afro, a black sweater with gray stripes, and red and black shoes." Two plainclothes police officers in the vicinity of the hardware store began pursuing Tommy because he generally fit that description. As they were chasing him, Officer Eric Eastlund yelled repeatedly, "[P]olice[!] [S]top[!]", but Tommy did not stop. The officers gave up the chase after Tommy hopped over two fences and headed into an open area near 16th Street and Owens. Eastlund's partner radioed for other officers to respond to 16th Street, and Tommy soon was found hiding in the area of 16th and Owens Streets.

Eastlund and his partner, Officer Christopher Leong, went to where Tommy was detained. Eastlund handcuffed him and searched him, finding no cell phones, no weapons, and no contraband. Officer Leong asked Tommy his name and birthdate to identify him. Upon realizing Tommy was a minor, Leong read him his *Miranda* rights.

Between 5:00 p.m. and 6:00 p.m., Sergeant Stephen Jonas, a police investigator, arrived where Tommy was detained in the back of a patrol car. He knew the case involved a stolen cell phone and knew Tommy's cell phone had not been stolen. He did not know whether Tommy had been *Mirandized*. Without giving him a *Miranda* advisement, Jonas asked Tommy his name, birthdate, home address, and phone number; and Tommy answered those questions. Jonas routinely asks the same questions of everyone he talks to in connection with a case: victims, suspects, and witnesses. He asks so he can get in touch with them later.

At the same time Lavalle, Koczab and the police were tracking down and detaining Tommy, other officers were closing in on D.T. While Xie was at the hardware store, Officer Jose Calvo-Perez let Xie use his cell phone to activate the "Find My iPhone" application. The initial "ping" from Xie's cell phone registered on Minnesota Street between 18th and 19th Streets. Sergeant Sean Frost was in the vicinity of Minnesota and 18th Streets when he got this information. He continued to travel in response to the moving "ping" locations until he was at Evans and Jennings. At that point, Frost realized there was only one car, a silver one, traveling in tandem with the

pinging phone and concluded the stolen phone was likely in that car. He pulled over the driver.

It turned out the car was driven by Erica Hollins, who sometimes drove for Lyft but was not on the job at that time. She told the police that D.T. approached her car and offered her $20 for a ride, so she accepted. D.T. slid into the passenger seat, and she headed for Third Street and Palou Avenue. Before she knew it, she was being pulled over by the police and handcuffed, along with D.T.

Officer Leong, having now responded to the scene of the car stop, continued to listen for the pinging phone and found it on the floor of Hollins's car behind the driver's seat. Eastlund searched the car and found another cell phone between the passenger's seat and the front door, and a third cell phone in D.T.'s pocket. D.T. also had two live rounds of ammunition in his front pocket. The police also seized Hollins's cell phone. When Sgt. Jonas arrived where the car had been stopped, he addressed both Hollins and D.T., asking them their names, birthdates, addresses, and telephone numbers. Eastlund turned over the four seized cell phones to Jonas.

Once D.T. and Tommy were both in custody, the police organized an in-field cold show in which Tommy was viewed individually, with no other suspects, handcuffed between two police officers. Xie, while "cowering" in the back of a police car about 20 feet away from Tommy, identified him as the first robber: the taller, thinner one who tried to snatch her phone from her hand. Koczab and Lavalle also both identified Tommy as one of the robbers in separate in-field cold shows.

When Xie was taken to the place where the silver car had been stopped and was shown Hollins and Hollins's car, she said she did not recognize either. She was not shown D.T. at that location. She was later shown D.T. at the parking lot of San Francisco General Hospital. She sat in the back of a patrol car, hysterical, shaking, and afraid to look up. When she saw D.T., she let out a gasp and said, " 'That's him! That's the second suspect that took my phone. Same hair[,] face and clothing. He was the driver of the car.' "

To determine whether any of the recovered phones belonged to Tommy, Jonas entered the phone number Tommy had given him. One of the phones, an iPhone 4 that had been recovered from D.T.'s pocket, rang. Tommy was thereby further implicated in the robbery because it connected him to D.T., who was found in the same car with the stolen cell phone shortly after the robbery.

After a bench trial, the judge found Tommy had committed the robbery and had resisted, delayed or obstructed the police in violation of Penal Code section 148. He was released to his mother's custody under the supervision of the probation officer. Conditions of his probation included an electronics search condition covering all his electronic devices, including but not limited to cell phones, smart phones, computers, laptops, iPads, and tablets. Tommy timely appealed.

II. DISCUSSION

A. *The Alleged* Miranda *Violation*

Tommy claims his rights under *Miranda* were violated when Sgt. Jonas asked for his phone number, without first giving him the familiar admonishments. The offending questions, in Tommy's view, were posed by Sgt. Jonas, who asked him the preliminary identifying information of name, birthdate, address, and phone number. Because the phone number ended up being a crucial link in the chain of proof of Tommy's involvement in the robbery, Tommy claims Jonas's testimony relating to the ringing of Tommy's phone, after it had been seized from D.T.'s pocket, should have been suppressed as the fruit of a *Miranda* violation.[4] Without that evidence, he argues, he likely would not have been found to have been involved in the robbery.

In fact, Tommy's answer to Sgt. Jonas's request for his phone number was not put before the jury. Thus, he asks us, in effect, to apply the "fruit of the poisonous tree"

[4] Tommy argued in his opening brief that his own statement should have been suppressed. In his reply brief, he admitted the phone number he gave Sgt. Jonas was not in evidence. He confirmed he was seeking suppression of Jonas's testimony that, when he entered the number given him by Tommy, one of the cell phones retrieved from D.T. rang.

doctrine in holding that the evidence of his phone ringing in response to the number Jonas entered should have been suppressed. (*Wong Sun v. United States* (1963) 371 U.S. 471, 488.) We find it unnecessary to address whether Sgt. Jonas's question was a "routine booking question" and subject to an exception to the *Miranda* requirements (*Pennsylvania v. Muniz* (1990) 496 U.S. 582, 601–602), or instead was custodial interrogation that the "police should [have] know[n] [was] reasonably likely to elicit an incriminating response from the suspect." (*Rhode Island v. Innis* (1980) 446 U.S. 291, 301, fn. omitted; see generally, *People v. Elizalde* (2015) 61 Cal.4th 523, 531–532, 538–539), for the fruit of the poisonous tree doctrine simply does not apply.)

People v. Case (2018) 5 Cal.5th 1 recognized that the doctrine applies in the case of a *Miranda* violation only when the answers that led to further evidence were a "product of police coercion." (*Id*. at pp. 23–24.) There is no evidence of police coercion in this case. "The fruit of the poisonous tree doctrine does not apply to physical evidence seized as a result of a noncoercive *Miranda* violation (*United States v. Patane* (2004) 542 U.S. 630, 637–638, 645; *People v. Davis* (2005) 36 Cal.4th 510, 552; *People v. Whitfield* (1996) 46 Cal.App.4th 947, 957) . . . ." (*People v. Davis* (2009) 46 Cal.4th 539, 598.) Likewise, it does not require suppression of Jonas's testimony about the ringing phone. (See *Case*, at pp. 23–27.) This rule sounds the death knell for Tommy's *Miranda* argument.

B. *The* Marsden *Motion and Counsel's Motion to Withdraw*

1. Background

On the first day of trial, Tommy told the judge he wanted a new attorney because his appointed attorney was not fighting hard enough for him. Specifically, he complained his attorney, Mark Friedland, had encouraged him to plead to a strike. At that point, defense counsel represented to the court that "a conflict ha[d] arisen in [his] representation of the minor," and he could not provide Tommy with effective assistance of counsel under the Sixth Amendment going forward. Friedland asked the court to appoint substitute counsel. He specifically requested to withdraw as counsel based on a "conflict of interest."

Nevertheless, upon the court's inquiry, counsel assured the judge he had "discussed every contingency with [his] client with respect to what could happen in this courtroom," and "Tommy ha[d] interpreted [their] discussions in the manner he[] described to the Court," which counsel "respect[ed]." Friedland again asked to be relieved.

The court denied Tommy's *Marsden* motion with the comment, "Mr. Friedland has been working his tail off for Tommy, trying to work in his best interests, trying to get him out of custody . . . ." The court cited a litany of motions Friedland had argued on Tommy's behalf, including multiple motions to release him from custody and a motion for severance. Stating that "a disagreement regarding potential tactics is not a reason to grant a *Marsden* motion," the court concluded Tommy's statements did not provide a basis to grant his motion.

The judge then gave Tommy's attorney the opportunity to address the court further, outside of Tommy's presence, on his motion to withdraw. Friedland told the judge that Tommy's mother consistently demonstrated hostility and anger toward him in the form of shouting, cross-examining him on trial strategy, and interfering with the attorney-client privilege. These circumstances led to the "complete pollution" of Friedland's relationship with Tommy. The attorney-client relationship had broken down to the point where Tommy was no longer communicating with Friedland and was reluctant even to sit next to him. Friedland characterized the problem as "more than just differences of opinions" and described Tommy's and his mother's attitude towards him as "overt hostility." Friedland said he could not, "in good conscience[,] go on" because he felt he would never again have confidential communication with Tommy, consistent with his professional responsibilities. Counsel also told the court "at no time did I advise my client to plead to a strike. We discussed various options and the context of release . . . But there was never advice to accept a strike."

The court queried counsel about his preparation for and readiness to go to trial. After being assured that counsel had "done [his] due diligence" and was prepared to proceed with the contested hearing, the court denied the motion to withdraw. The court

observed, "Mr. Friedland has plenty of experience dealing with tough parents . . . Tommy did not state anything to the Court that caused it to lose trust. That the relationship between him and his attorney is so broken, so irrevocably broken that he cannot receive a fair trial, and that Mr. Friedland will not do his best in terms of what is in the minor's best interests." Tommy contends his *Marsden* motion and his attorney's motion to withdraw were improperly denied.

2. Analysis

The denial of a *Marsden* motion is reviewed for abuse of discretion. (*People v. Streeter* (2012) 54 Cal.4th 205, 230.) " 'Denial is not an abuse of discretion "unless the defendant has shown that a failure to replace counsel would substantially impair the defendant's right to assistance of counsel." ' " (*Ibid*.; accord, *People v. Clark* (2011) 52 Cal.4th 856, 912.) Likewise, "[t]he determination whether to grant or deny a motion by an attorney to withdraw is within the sound discretion of the trial court and will be reversed on appeal only on a clear showing of abuse of discretion." (*People v. Sanchez* (1995) 12 Cal.4th 1, 37 (*Sanchez*).) We discern no abuse of discretion.

A criminal defendant may request substitute counsel, and an attorney may also move to withdraw as counsel, based upon a complete breakdown in the attorney-client relationship. (*Marsden*, *supra*, 2 Cal.3d at p. 123 [defendant's motion]; *People v. Cohen* (1976) 59 Cal.App.3d 241, 248–249 [attorney's motion].) The court here correctly noted, however, that a disagreement between counsel and his or her client regarding trial tactics ordinarily is not grounds for granting a *Marsden* motion.[5] (*People v. Alfaro* (2007) 41 Cal.4th 1277, 1320; *People v. Dickey* (2005) 35 Cal.4th 884, 922.) Even accepting for argument's sake Tommy's version of the facts, his chief complaint seemed to be that Friedland had encouraged him to accept a plea to a strike offense. (Pen. Code,

[5] Strictly speaking, this was more than a tactical disagreement, since the decision whether to enter a plea or go to trial ultimately remains the defendant's, not counsel's. (*People v. Robles* (2007) 147 Cal.App.4th 1286, 1290.) Tommy could simply have overridden his attorney's advice—assuming there was such advice—and no irreconcilable conflict would have resulted, unless his counsel refused to prepare for and conduct a contested hearing. There was no danger of that in Tommy's case.

§§ 1170.12, 1192.7, subd. (c)(19).) A defense attorney's advice to a defendant that he or she should accept a plea bargain does not require a trial court to grant the defendant's *Marsden* motion. (*People v. Abilez* (2007) 41 Cal.4th 472, 485–487 (*Abilez*).) Counsel on appeal minimizes Tommy's complaint about the pressure he felt to admit the robbery offense and instead focuses on the "complete breakdown" of the relationship occasioned by Tommy's mother's interference. But Tommy never mentioned any conflict arising from his mother's attitude toward or advice about Friedland, and the whole subject was not a part of Tommy's *Marsden* motion.

Rarely, a disagreement over tactics or over matters as to which the defendant has the final word, such as the right to plead or go to trial, " 'may signal a breakdown in the attorney-client relationship of such magnitude as to jeopardize the defendant's right to effective assistance of counsel.' " (*People v. Williams* (1970) 2 Cal.3d 894, 905.) This is not such a case. The record belies Tommy's complaint that Friedland was not fighting hard for him. In addition to the various pretrial actions counsel had taken on Tommy's behalf, recited by the court, Friedland later filed a *Miranda* motion and argued it to the court (albeit unsuccessfully), made objections at trial, cross-examined witnesses, argued against admissibility of exhibits related to the cold show identifications, and argued Tommy's case to the judge. A general complaint of the not-fighting-hard-enough ilk is not grounds for substitution of counsel. (See *Abilez*, *supra*, 41 Cal.4th at p. 489 ["[d]efendant's mere allegation that he [does] not trust his defense attorney, without more, [is] insufficient to compel the trial court to replace him"].) Even the prospect that a defendant intends to take the stand and perjure himself—and his attorney's ethical opposition to such a course—does not amount to an irreconcilable conflict requiring substitution of counsel. (*People v. Brown* (1988) 203 Cal.App.3d 1335, 1338.)

A trial court must grant counsel's motion to withdraw when a "disagreement with counsel resulted in a complete breakdown in the attorney-client relationship that jeopardized his right to a fair trial." (*Sanchez*, *supra*, 12 Cal.4th at p. 37.) As with the denial of a *Marsden* request, the judge wields great discretion in determining whether the attorney's description of the conflict discloses a potential deprivation of Sixth

Amendment representation for the client. (*Ibid*.) Tommy points to nothing in the trial transcript to show he received less than zealous representation, and our own review of the record suggests nothing of the sort. The trial judge's confidence in Friedland's performance and dedication should not be second-guessed by an appellate court, when no obvious breakdown in the relationship or deficiency in performance appears from the record. There is no such evidence in this record, and we affirm the trial court's ruling on the *Marsden* and withdrawal motions.

C. *Sufficiency of the Evidence of Identity as a Robber*

Tommy also argues the evidence was insufficient to show he was one of Xie's robbers. We review such a claim for substantial evidence from which a reasonable trier of fact could find the minor guilty beyond a reasonable doubt. (*People v. Penunuri* (2018) 5 Cal.5th 126, 142; *In re Daniel C.* (2011) 195 Cal.App.4th 1350, 1359.)

This claim is without merit. Xie, Koczab and Lavalle all identified Tommy as one of the robbers at separate cold shows. His physical features generally matched the description given by Xie: Tommy is an African American, 5'8" tall, weighs 140 pounds, and was almost 18 at the time. He was apprehended in the vicinity of the robbery shortly after it occurred. His clothing matched the description of the robber's clothing. He ran from the police, though they announced their authority and ordered him to stop. He hid from the police at 16th and Owens Streets. Such behavior is consistent with consciousness of guilt. (*People v. Smithey* (1999) 20 Cal.4th 936, 982–983 [flight alone is not sufficient to establish guilt, but may be considered evidence of consciousness of guilt]; *People v. Marui* (1922) 190 Cal. 174, 179 ["consciousness of guilt might be inferred from his immediate flight from the scene of the crime and his remaining in hiding until he was apprehended"]; *People v. Vu* (2006) 143 Cal.App.4th 1009, 1030.)

And finally, there is the fact that Tommy's telephone rang when Sgt. Jonas entered the number Tommy had given him. The phone had been taken from D.T.'s possession. D.T. was also in constructive possession of Xie's phone at the time, which solidified Tommy's connection to the robbery of Xie. Koczab even testified he thought he saw Tommy making his way through traffic and approaching the black car as it was driving

away, which would explain how Xie's phone (and maybe Tommy's own phone) got from Tommy's hands, when Xie caught up with the robbers near the black car, into D.T.'s possession. D.T. then evidently ditched the black car and tried to get a Lyft driver to take him away from the scene. The "pinging' phone spoiled his plan. Collectively, this was more than enough evidence of Tommy's involvement to warrant a true finding on the robbery allegation.

D. *The Electronics Search Condition*[6]

1. *Background*

At the dispositional hearing on March 15, 2016, the juvenile court imposed several terms and conditions of probation. One was an electronics search condition covering "any electronic and/or digital device" in Tommy's possession or under his custody or control, including but not limited to "cell phones, smart phones, iPads, computers, laptops, and tablets."[7] The scope of the search condition included and was not limited to "any and all text messages, voice mail messages, call logs, photographs, videos, e-mail accounts, and social media accounts" including but not limited to "Facebook, Instagram, Twitter, and Snapchat." Tommy was also ordered to provide "any and all passwords to the devices" and "any and all passwords necessary to access the information stated by the Court here on the record." The court explained it did not authorize search of medical and financial "apps" such as Kaiser and Wells Fargo, or online games or music libraries. Defense counsel objected to the imposition of any electronic search condition on grounds

[6] The Supreme Court has granted review in many cases dealing with an electronics search condition, with the lead case being *In re Ricardo P.*, review granted February 17, 2016, S230923. (See Issues Pending Before the California Supreme Court in Criminal Cases, available at <http://www.courts.ca.gov/13648.htm>.)

[7] The written electronics search condition was as follows: "Any electronic and/or digital device in your possession or under your custody or under your control may be searched at any time of the day or night, by any peace or probation officer, with or without a warrant or with or without reasonable or probable cause. Electronic and/or digital devices include but are not limited to cell phones, smartphones, I Pads, computers, laptops and tablets. You are also ordered to provide any and all passwords to the devices upon request to any peace or probation officer, including text/phone messages, Twitter, Facebook, Instagram or Snapchat accounts."

it was not sufficiently related to Tommy's prior conduct and on constitutional overbreadth grounds.

Tommy does not claim on appeal the condition must be stricken in its entirety. Rather, he claims the condition is overbroad insofar as it pertains to electronic devices other than cell phones and smart phones in his possession or control and violates *Lent* to the same extent. He also claims it is overbroad in allowing authorities access to content on his devices that is unnecessary to detect whether the device was stolen.

2. The Lent *Test*

The Supreme Court in *Lent, supra,* 15 Cal.3d 481 set forth three criteria for assessing the validity of a condition of probation: "A condition of probation will not be held invalid unless it '(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality . . . .' " (*Id.* at p. 486.) Accordingly, a condition of probation that forbids or requires conduct that is not itself criminal is valid only if that conduct is reasonably related either to the crime of which the defendant was convicted or to future criminality. (*In re Babak S.* (1993) 18 Cal.App.4th 1077, 1084.)

Tommy agrees that, because he stole a cell phone, the court could impose an electronics search condition of probation allowing limited examination of any cell phone or smart phone he might have in his possession. (*In re Malik J.* (2015) 240 Cal.App.4th 896, 901–902, 904 (*Malik J.*) [finding a relationship between an electronics search condition and the minor's specific crime under the first prong of *Lent* because Malik had robbed others of their cell phones]; *People v. Ebertowski* (2014) 228 Cal.App.4th 1170, 1173, 1176–1177 (*Ebertowski*) [adult electronic search condition valid under first prong of *Lent* for defendant who had promoted his gang through social media].) To that extent, he does not challenge the condition under *Lent*. But Tommy does challenge, as unreasonable under *Lent,* that condition as applied to electronic devices other than cell phones. Because the only item he stole was a cell phone, he contends he should not be

required to surrender any of his electronic devices for search by authorities, except any cell phones or smart phones in his possession.

In *People v. Maldonado* (2018) 22 Cal.App.5th 138, review granted June 20, 2018, S248800 (*Maldonado*), the Sixth District recently rejected the argument that an electronics search condition must be limited to the specific type of device involved in a defendant's crime. *Maldonado* held that a defendant who had used a cell phone in connection with possession of methamphetamine for sale could be subjected to a broad electronics search condition, including but not limited to "cellular telephones, computers or notepads in [his] possession or under [his] control." (*Id*. at p. 141.) As with Tommy's condition of probation, Maldonado's focused on the probationer's communications with others by authorizing searches of "text messages, voicemail messages, call logs, photographs, email accounts, social media accounts, including but not limited to Facebook, Instagram, Twitter, [and] Snapchat." (*Ibid*.) Maldonado, like Tommy, argued that only cell phones could be subject to the search condition, since only a cell phone was used in his crime. (*Id*. at pp. 142–143.)

The Sixth District nevertheless approved the condition without modification on the first prong of *Lent*, reasoning that to hold otherwise would make it too easy for the probationer to circumvent the requirement by using a different device for illegal communications. (*Maldonado, supra*, 22 Cal.App.5th at p. 143.) We agree with this reasoning and believe it applies to this case, where Tommy could simply start stealing a different type of electronic device and thereby avoid search. The condition was reasonably related to Tommy's criminal conduct and future criminality. We therefore hold the court's imposition of the electronics search condition was not an abuse of discretion and did not violate *Lent*.

3. *Overbreadth*

Tommy also challenges the electronics search condition on constitutional grounds, which we review de novo. (*Malik J., supra*, 240 Cal.App.4th at p. 901.) "A probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as

unconstitutionally overbroad." (*In re Sheena K.* (2007) 40 Cal.4th 875, 890.) True, "parolees and probationers retain some expectation of privacy, albeit a reduced one." (*In re Jaime P.* (2006) 40 Cal.4th 128, 137.) But as a probationer, Tommy's diminished expectation of privacy is "markedly different from the broader privacy guaranteed under the Fourth Amendment to individuals who are not serving sentences or on grants of probation." (*In re Q.R.* (2017) 7 Cal.App.5th 1231, 1238, review granted Apr. 12, 2017, S240222 (*Q.R.*).) "It is that preconviction expectation of privacy that was at issue in *Riley v. California* (2014) 573 U.S. ___ [189 L.Ed.2d 430, 134 S.Ct. 2473] (Riley), where the United States Supreme Court announced the general rule that police may not conduct a warrantless search of a cell phone seized incident to an arrest. (*Riley*, *supra*, 573 U.S. at p. ___ [134 S.Ct. at p. 2485].)" (*Q.R.*, at p. 1238.)

Malik J. found an electronics search condition reasonably related to the juvenile's offense where he and one or two companions robbed three women in one night, including stealing one of their cell phones. (*Malik J.*, *supra*, 240 Cal.App.4th at p. 899.) Still, applying the overbreadth doctrine, and in light of the significant intrusion on privacy, *Malik J.* modified the condition of probation to tailor it more narrowly: "The electronics condition is ordered modified to omit reference to Malik's family and passwords to social media sites, and to authorize warrantless searches of electronic devices in Malik's custody and control only after the device has been disabled from any internet or cellular connection and without utilizing specialized equipment designed to retrieve deleted information that is not readily accessible to users of the device." (*Id.* at p. 906.)

Tommy suggests his probation condition should be similarly modified, arguing it is not necessary for the authorities to gain such broad access to the content of his electronic devices in order to determine if they were stolen. He urges us to hold also that the probation condition was unconstitutionally overbroad insofar as it (1) allowed search of electronic devices other than his phone, and (2) allowed probation officers or police to gain access to "any and all text messages, voice mail messages, call logs, photographs, videos, e-mail accounts, and social media accounts," including "Facebook, Instagram, Twitter, and Snapchat."

For the same reasons discussed in part II.D.2., *ante*, we reject Tommy's argument that his electronic devices other than his phone should be exempt from search. As for his second point, we find the following factors sufficient to justify the broad search condition: (1) the crime (robbery) was a serious one, implicating concerns for public safety (compare *People v. Trujillo* (2017) 15 Cal.App.5th 574, 577, 585, review granted Nov. 29, 2017, S244650 [robbery and assault] with *In re Erica R.* (2015) 240 Cal.App.4th 907, pp. 909–910 [misdemeanor drug possession]; *In re J.B.* (2015) 242 Cal.App.4th 749, 752 [petty theft]; *In re P.O.* (2016) 246 Cal.App.4th 288, pp. 291–292 [public intoxication]); (2) Tommy and his co-participants stole a cell phone (*Malik J.*, *supra*, 240 Cal.App.4th at pp. 901–902, 904); (3) D.T. was found with three cell phones, including Tommy's, which supports an inference the co-participants used their cell phones in planning and executing the robbery (*Maldonado*, *supra*, 22 Cal.App.5th at pp. 144–145); and (4) Tommy was prohibited by the court from having contact with his co-participants and victims and from using drugs or alcohol, and the condition in question would help to monitor his compliance (e.g., *Ebertowski*, *supra*, 228 Cal.App.4th at p. 1175).

To be sure, one purpose of the search condition was to allow police and probation officers to determine whether an electronic device in Tommy's possession was stolen, but that was not the only purpose. The government's interest in the challenged condition also includes preventing Tommy from using electronic devices in the future to facilitate illegal activity or to violate the terms of his probation. That Tommy acted in concert with two others in robbing Xie, and that a co-perpetrator was found in possession of three cell phones (including Tommy's) when arrested, further suggests the co-participants either had communicated or were prepared to communicate wirelessly at the time of the crime.

Even *Malik J.* is distinguishable on this basis. The court in *Malik J.* noted "there is no indication Malik used e-mail, texting or social networking Web sites to facilitate his criminal activities, and we express no opinion as to whether the electronics search condition would be valid as imposed if he had. (See, e.g., *Ebertowski*, *supra*, 228 Cal.App.4th at pp. 1176–1177 [*Lent* standard satisfied where evidence showed

defendant was a gang member who used social media to promote his gang].)" (*Malik J.*, *supra*, 240 Cal.App.4th at p. 904, fn. 2.) Thus, *Malik J.* left open the possibility that a broader search condition would pass constitutional muster if there was evidence the probationer used an electronic device in connection with the commission of his offense.

Because there was such evidence in this case, we do not view the modified probation condition adopted in *Malik J.* as establishing the outer limit for a constitutional electronics search condition. In fact, more recently, *Maldonado* rejected an overbreadth challenge to a condition very similar to that in Tommy's case because the defendant was found in possession of a cell phone when he was arrested for his crime. (*Maldonado*, *supra*, 22 Cal.App.5th at pp. 141, 144–145; see also, *People v. Guzman* (2018) 23 Cal.App.5th 53, 65 [condition upheld where, as part of a sting operation, defendant used his cell phone and a website to arrange for a sexual encounter with what he thought was a 13-year-old girl]; *Q.R.*, *supra*, 7 Cal.App.5th at p. 1238, review granted Apr. 12, 2017, S240222 [electronics search condition upheld where solo actor used electronic device in his crime].) In *People v. Valdivia* (2017) 16 Cal.App.5th 1130, review granted Feb. 14, 2018, S245893, on the other hand, the Third District found a probation condition very like Tommy's was overbroad in the context of a domestic violence case where there was no evidence an electronic device played any role in the crime. (*Id.* at pp. 1136–1139, 1145–1148.)

Significantly, Tommy's conditions of probation proscribed contact with his co-participants in the phone robbery and the victims of his offenses,[8] and we think the crime justifies a broader search condition than the one crafted by the appellate court in *Malik J.* Tommy also had weapons, drug and alcohol proscriptions. Giving police and probation officers "robust access" to Tommy's electronic devices is appropriate to ensure he does not reoffend while on probation and does not contact his co-participants in or victims of his crimes. (*Q.R.*, *supra*, 7 Cal.App.5th at p. 1238; see also, *In re Juan R.* (2018)

[8] At the time of the robbery, Tommy was on probation in San Mateo County for hitting a car with his dirt bike and leaving the scene of the accident. His conditions of probation required him to stay away from that victim, as well as Xie.

22 Cal.App.5th 1083, 1091–1092, review granted July 25, 2018, S249256 [approving electronics search condition against *Lent* and overbreadth challenges in part because minor was subject to associational prohibition under terms of probation];[9] *People v. Acosta* (2018) 20 Cal.App.5th 225, 234, review granted Apr. 25, 2018, S247656 [electronics search condition valid to monitor forbidden contacts, even where device not used in the offense].) And because Tommy is a ward of the court, he is subject to more restrictive conditions than would be lawful for a similarly-situated adult offender. (*In re Victor L.* (2010) 182 Cal.App.4th 902, 909–910; see, e.g., *In re J.E.* (2016) 1 Cal.App.5th 795, 801, review granted Oct. 12, 2016, S236628 (*J.E.*) [condition valid under *Lent*'s third prong and not overbroad, where the minor's "constellation of issues requir[ed] intensive supervision"]; *Juan R.*, *supra*, 22 Cal.App.5th at pp. 1086, 1091 [minor exhibited similar "constellation of needs"].)[10]

Gaining access to Tommy's text messages, call logs and emails would help authorities to monitor his compliance with his associational conditions of probation. Access to photographs, videos and social media is sometimes justified in drug, gang and weapons cases because juveniles and gang members often display photos of themselves using drugs, handling weapons, engaging in gang activity, or associating with forbidden contacts. (See *In re J.B.*, *supra*, 242 Cal.App.4th at pp. 755–757; *In re Erica R.*, *supra*,

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[9] The probation condition in *Juan R.* was more narrowly drafted. It ordered the minor to " '[s]ubmit [his electronic devices] to search . . . for electronic communication content information likely to reveal evidence that the minor is continuing his criminal activities and is continuing his association via text or social media with co-companions. This search should be confined to areas of the electronic devices including social media accounts, applications, websites where such evidence of criminality [or] probation violation may be found.' " (*Juan R.*, *supra*, 22 Cal.App.5th at p. 1094, italics omitted.)

[10] Tommy points out he does not have the same "constellation of issues" involved in *J.E.* and *Juan R.* He has strong family ties, a limited juvenile court history, he was a sports star in high school, had graduated from high school and enrolled in college before the cell phone robbery, and he participated in various job training programs both before and after his arrest. Tommy had no known gang involvement, no serious drug problem, and weapons were not involved in his offense. We agree this distinguishes his case from *J.E.* and *Juan R.*, but we do not agree it demands a different outcome.

240 Cal.App.4th 907, 913; *Ebertowski*, *supra*, 228 Cal.App.4th at p. 1175.) Although Tommy's history suggests he does not need to be supervised so intensively for gang activity (see fn. 10, *ante*), he does have forbidden contacts, as well as weapons, drug and alcohol conditions, and giving authorities access to his photos, videos and social media would allow them to monitor his compliance with those conditions. The search condition is narrowly tailored to satisfy compelling governmental interests. We find no constitutional overbreadth.

E. *Maximum Term of Confinement*

At disposition, the court stated Tommy was subject to a maximum term of confinement of five years, six months. Tommy is correct that a maximum term of confinement should not have been stated because he was placed in his mother's home. Such a statement is called for only when a minor is being removed from parental custody. (Welf. & Inst. Code, § 726, subd. (d)(1).) When a minor is not removed from the physical custody of his or her parent at disposition, however, the court has no statutory authority to state a maximum period of confinement. (*In re Matthew A.* (2008) 165 Cal.App.4th 537, 541.) When a juvenile court's dispositional order for a minor not removed from parental custody includes a maximum term of confinement, the remedy is to "strike the term." (*Ibid*.; accord, *In re A.C.* (2014) 224 Cal.App.4th 590, 592.) The Attorney General argues that, because the written dispositional order did not contain a maximum term of confinement, there was in effect no error, and no correction is needed. (Cf. *In re P.A.* (2012) 211 Cal.App.4th 23, 30–32 [court's statement of maximum term at jurisdiction hearing required no remedy].) Out of an abundance of caution, we will order the statement stricken from the transcript of the dispositional hearing.

III. DISPOSITION

The jurisdiction and disposition orders are affirmed. The case is remanded to superior court with direction to the clerk to strike from the reporter's transcript, at page 985, the court's statement of a maximum term of confinement.

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Streeter, Acting P.J.

We concur:

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Reardon, J.

_____
Smith, J.*

* Judge of the Superior Court of California, County of Alameda, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.